83-250

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES MONTGOMERY GIBSON, Petitioner

vs.

STATE OF UTAH, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF STATE OF UTAH

ROBERT VAN SCIVER
Counsel of Record for Petitioner
321 South Sixth East
Salt Lake City, Utah 84102-4082
Telephone: (801) 322-5678

RICHARD G. MacDOUGALL
321 South Sixth East
Salt Lake City, Utah 84102-4082
Telephone: (801) 531-1990

Attorneys for Petitioner

QUESTION PRESENTED

Did the stop of Petitioner's vehicle and seizure of his person constitute an unreasonable search and seizure under the Fourth and Fourteenth Amendments to the Constitution of the United States?

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IN THE

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Petitioner

vs.

STATE OF UTAH,

Respondent

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Utah

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

James Montgomery Gibson, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment and decision of the Supreme Court of Utah entered in the above-entitled case on June 10, 1983.

OPINIONS BELOW

The opinion of the Supreme Court of Utah is not yet reported, but a copy is reproduced in Appendix A hereto. A copy of the Decision of the Third Judicial

District Court of Summit County, State of Utah, on Petioner's initial stage of appeal is also reproduced in Appendix A.

JURISDICTION

The decision of the Supreme Court of Utah was issued on June 10, 1983. The jurisdiction of this court is invoked under 28 U.S.C. S1257 (3) and Rules 17 through 23 of the United States Supreme Court Rules.

QUESTION PRESENTED

Did the stop of Petitioner's vehicle and seizure of his person constitute an unreasonable search and seizure under the Fourth and Fourteenth Amendments to the Constitution of the United States?

STATUTES INVOLVED

The Fourth and Fourteenth Amendments to the Constitution of the United States and Section 41-1-17(c), Utah Code Annotated (1953), as amended.

STATEMENT

Petitioner was charged by Information in the Circuit Court of Summit County, State of Utah, with the offense of driving on revocation.

The charge arose as a result of a traffic stop of Petitioner's vehicle and Petitioner's arrest on September 21, 1981 by Trooper Frank Marcellin of the Utah Highway Patrol.

Marcellin testified at trial that he observed Petitioner's vehicle southbound on State Road 224 on the above date. He stated he had previously arrested Peti-

tioner for driving while under the influence of alcohol, of which Petitioner was convicted, and that he stopped Petitioner's vehicle solely to check the status of Petitioner's driver's license. There was no evidence of any traffic offense being committed by Petitioner at the time, and Trooper Marcellin indicated that the stop was based on information he had received in a radio check on Petitioner's driver's license on June 1, 1981 indicating that the license was revoked.

Marcellin testified that he made no attempt to confirm Petitioner's driver's license status by radio check while in pursuit and that he had made no additional attempts to check on the status between June 1, 1981 and September 21, 1981.

Counsel for Petitioner moved to suppress all evidence obtained by the stop and arrest of Petitioner based on a claim that the stop and arrest constituted an unreasonable search and seizure. The motion was denied and Petitioner was convicted.

On appeal to the District Court of Summit County, the Court affirmed Petitioner's conviction, but vacated his sentence and remanded for a new sentencing proceeding. At the re-sentencing, Petitioner was sentenced to thirty days in jail, to be suspended on payment of a $299.00 fine.

On appeal to the Supreme Court of Utah, Petitioner's conviction was affirmed. The Circuit Court granted a stay to Petitioner to pursue the present Petition. A copy of the Motion and Order staying execution of sentence is reproduced in Appendix "A" hereto.

REASON FOR GRANTING THIS WRIT

POINT

THE STOP AND ARREST OF PETITIONER CONSTITUTED AN UNREASONABLE SEIZURE PROHIBITED BY THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Supreme Court of Utah, in rendering the decision in Petitioner's case, paid lip service to the standards set forth by this court in *United States v. Brignoni-Ponce*, 422 U. S. 873 (1975) and *Delaware v. Prouse*, 440 U. S. 648 (1979), concerning the elements of probable cause necessary to stop a vehicle. It was in the application of those standards to Petitioner's case where the decision of the Supreme Court of Utah conflicts with the decision of this court in *Brignoni-Ponce* and *Prouse*, supra.

The critical determination for purposes of this Petition is whether Trooper Marcellin's suspicion was "reasonable" or a mere "hunch". Petitioner asserts that it was the latter.

It is undisputed that Petitioner was not operating his vehicle in an objectively unlawful manner absent the stop to check his driver's license. It is also undisputed that Trooper Marcellin based the stop solely on the knowledge that Petitioner's license had been revoked, which he had confirmed by a radio check nearly four months prior to the date Petitioner was arrested.

The information in the Trooper's possession at the time he stopped Petitioner's vehicle was so stale as to constitute no more than mere speculation that Peti-

tioner's license might still be rovoked. This is especially true in light of Marcellin's testimony at trial that he was aware of the ready availability of a restricted driver's license to a person in Petitioner's position.

Trooper Marcellin conceded that he made the stop for the sole purpose of checking on the status of Petitioner's license. Consequently, it is apparent that the detention of Petitioner's vehicle and his arrest were the product of a random, single-vehicle stop prohibited by the holding of this court in *Delaware v. Prouse*, supra.

The proscription against random single-vehicle stops for the purpose of checking driver's licenses derives from the fundamental constitutional principles embodied in the Fourth Amendment, as applied to the states by the Fourteenth Amendment, to the Constitution of the United States, prohibiting unreasonable warrantless intrusions upon the privacy of the individual.

As it relates to automobiles, the constitutional prohibition on random stops is also embodied in S41-1-17(c), Utah Code Annotated (1953), as amended, which, in accordance with the rationale of *Prouse*, supra, authorizes a police officer to make a traffic stop only upon a reasonable belief the driver is operating a vehicle in violation of traffic law.

The decision of the Supreme Court of Utah affirming Petitioner's conviction clearly conflicts with pertinent decisions of this court on Fourth Amendment grounds and ignores the statutory limits on a peace officer set forth by relevant State law.

The opinion of the Supreme Court of Utah in Petitioner's case is mere judicial gloss wich ignores the basic question as to what constitutes reasonable cause justifying a traffic stop by a police officer.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this court to exercise its supervisory power and to grant this Petition.

DATED this 2nd day of August, 1983.

Respectfully submitted,

ROBERT VAN SCIVER
Counsel of Record for Petitioner
321 South Sixth East
Salt Lake City, Utah 84102-4082
Telephone: (801) 322-5678

RICHARD G. MacDOUGALL
321 South Sixth East
Salt Lake City, Utah 84102-4082
Telephone: (801) 531-1990

Attorneys for Petitioner

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF UTAH

State of Utah,
Plaintiff and Respondent,

v.

James Montgomery Gibson,
Defendant and Appellant.

No. 18829
FILED
June 10, 1983

Geoffrey J. Butler, Clerk

DURHAM, Justice:

This is an appeal from a conviction for driving with a revoked driver's license in violation of U.C.A., 1953, SS 41-2-28 & 30. We affirm.

On January 1, 1981, Trooper Frank Marcellin of the Utah Highway Patrol arrested the appellant James Montgomery Gibson for driving while under the influence of intoxicants (hereafter "DUI") in violation of U.C.A., 1953, SS 41-6-44 to -44.10. The appellant refused to take a chemical test to determine his blood alcohol content. On April 30, 1981, the appellant was tried and convicted as charged. On June 1, 1981, Trooper Marcellin checked the status of the appellant's driver's license and found that it had in fact been revoked.

On September 21, 1981, at approximately 4:30 p.m., Trooper Marcellin had parked his patrol car facing north on state road 224 (hereafter "SR 224") and was engaged in conversation with a fellow trooper. At this time, Trooper Marcellin observed a brown Porsche automobile proceeding toward him southbound on SR 224 and being driven by the appellant. Knowing that the appellant's driver's license had been rovoked and suspecting that it was still revoked, Trooper Marcellin pursued the appellant and pulled him over. Upon questioning the appellant, Trooper Marcellin learned that the appellant's license was in fact still revoked and that the appellant was returning to Park City from Salt Lake City after attempting to obtain a restricted driver's license. *See* U.C.A., 1953, S 41-2-18(d) (regarding restricted driver's licenses). Trooper Marcellin arrested the appellant for driving while his license was revoked in violation of U.C.A., 1953, SS 41-2-28 & -30.

Prior to trial in the Fifth Judicial Circuit Court of Summit County, the appellant filed a motion to supress all of the evidence obtained as a result of the appellant's arrest, claiming that Trooper Marcellin lacked probable cause to stop the appellant. At trial, the appellant continuously objected to any reference by the prosecution to the appellant's prior arrest and conviction for DUI. The appellant did not, however, object to the prosecution's offering into evidence a certified copy of the appellant's driving record, which contained information regarding the appellant's DUI conviction. The circuit court denied the appellant's motion to suppress and convicted the appellant of the crime of driving while his driver's license was revoked. The appellant appealed that decision to the district court, which affirmed the conviction but vacated the sentence. After a new sentencing, the appellant filed the present appeal with this Court.

On appeal, the appellant advances two points of error. First, the appellant contends that the circuit court erred in finding that Trooper Marcellin's stopping of the appellant on September 21, 1981, was not a random stop constituting an unreasonable seizure in violation of the U.S. and Utah Constitutions. *See* U.S. Const. amend. 4; Utah Const. Art. I, S 14. Second, the appellant claims that the circuit court erred in admitting into evidence his prior DUI conviction.

In order to determine whether Trooper Marcellin's conduct was an unreasonable seizure in violation of the U.S. and Utah Constitutions, we must balance the promotion of legitimate governmental interests against the intrusion upon the individual's Fourth Amendment interests. *See, e.g., Terry v. Ohio,* 392 U.S. 1, 21 (1968). *See generally* 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* S 10.8 (1978 & Supp. 1983). The U.S. Supreme Court has stated:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based

> on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Terry v. Ohio, supra, at 21-22 (citations omitted).

In balancing these interests, the U.S. Supreme Court has states:

> (A) requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents . . . from indiscriminate official interference.

United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975). In further defining the standard necessary to stop a particular driver, the Court stated:

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations--or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered--we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.

Delaware v. Prouse, 440 U.S. 648, 661 (1979) (citations omitted). The Court continued:

> Accordingly, *we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed* or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, *stopping an automobile and detaining the driver in order to check his driver's license* and the registration of the automobile *are unreasonable under the Fourth Amendment.*

Id. at 663 (emphasis added).

In applying the above standards to the present case, we hold that Trooper Marcellin's conduct did not constitute an unreasonable seizure in violation of the appellant's constitutional rights. From Trooper Marcellin's previous encounter with the appellant, he knew that, as late as June 1, 1981, the appellant's driver's license had been revoked pursuant to the DUI conviction. Furthermore, on September 21, 1982, Trooper Marcellin had a "reasonable suspicion" that the appellant's driver's license was still revoked. Thus, under the circumstances, Trooper Marcellin's stopping of the appellant was not a random stop and did not violate the appellant's rights under the U.S. or Utah Constitutions. *See Delaware v. Prouse, supra; United States v. Brignoni-ponce, supra; Terry v. Ohio, supra. See also State v. Elliot*, Utah, 626 P. 2d 423 (1981); *State v. Whittenback*, Utah, 621 P. 2d 103 (1980).

The defendant's second contention regarding the circuit court's alleged error in admitting into evidence the

defendant's prior DUI conviction is not reviewable because it does not raise a constitutional question. Therefore, the district court's decision thereon is final and is not reviewable by this Court. *See State v. Taylor*, Utah, No. 17674 (filed April 5, 1983); Utah Const. art. VIII,: 9; U.C.A., 1953, S 78-3-5 (Supp. 1981).

Affirmed. No costs awarded.

STEWART, Justice: (Concurring)

I fully concur in the opinion of the Court, but like Justice Oaks, feel constrained to add an additional comment. Unlike Justice Oaks, I concurred in *State v. Taylor*, Utah (No. 17674, filed April 5, 1983), which sustained the constitutionality of the statute authorizing this Court to hear appeals in cases which arise in the circuit courts and which involve constitutional issues. Nevertheless, I agree with Justice Oaks that the caseload of this Court is far too great and that the mandatory requirement imposed by U.C.A., 1953, S78-3-5, that we hear every appeal from a case originated in a circuit court "involving a constitutional issue" imposes an undue burden on this Court which contributes to our overload and threatens the integrity of the deliberative processes indispensable to the proper functioning of an appellate court. This is all the more true now that it is clear that this Court does have jurisdiction of constitutional issues in cases initiated in a circuit court. There can be little doubt from any objective point of view that legislative action to permit this Court to exercise *discretionary* jurisdiction rather than mandatory jurisdiction.

1. On the appellant's prior arrest for DUI, he refused to take a chemical test. Under Utah's Implied Consent

Statute, such a refusal can result in the revocation of one's driver's license for a one-year period. *See* U.C.A., 1953, S 41-6-44.10, in such cases is highly desirable and would make at least a small contribution toward solving the caseload problem of this Court.

Howe, Justice, concurs in the concurring opinion of Justice Stewart.

OAKS, Justice: (Concurring)

I concur in the opinion of the Court, and add an additional observation on the jurisdiction of this Court to review traffic cases and other cases commenced in the circuit courts.

Having been unsuccessful in a dissent on this point, I now acquiesce in the majority's holding that this Court has the *constitutional* power to hear an appeal of a case that began in the circuit court and has already been heard on appeal in the district court and does not involve the validity or constitutionality of a statute. *State v. Taylor*, No. 17674, filed Apr. 5, 1983. But I protest the *wisdom* of a statute that imposes such jurisdiction on this Court. Discretionary jurisdiction would be another matter, but U.C.A., 1953, S 78-3-5 requires us to hear every such appeal "involving a constitutional issue." In this case, and in others we have received, the only "constitutional issue" is the sufficiency of evidence for a probable cause determination attendant upon a constitutional right. Some such cases pose significant issues for review and ruling by a supreme court, but most--like the present case--are simply applications of well-established principles to various factual situations.

As the Supreme Court of this state staggers under an obligatory jurisdiction that now brings us more than 700 filings per year, I respectfully suggest that the Legislature enact a means of relieving this Court from the statutory duty of reviewing every circuit court case the parties choose to appeal for a second time after they have already received (and lost) one appellate review in the district court. Although cases commenced in the circuit court currently comprise only about one to two percent of our filings, that number is likely to increase in view of our ruling in *State v. Taylor supra*. In any event our current overload is most likely to be relieved by the total effect of various small reductions, and the elimination of obligatory jurisdiction in circuit court cases is a good place to start.

Hall, Chief Justice, concurs in the concurring opinion of Justice Oaks.

IN THE DISTRICT COURT
OF SUMMIT COURT
STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs DECISION

JAMES MONTGOMERY GIBSON, Criminal No. 912

Defendant.

The above matter came before the Court on appeal from the Fifth Circuit Court of Summit County with the Honorable Larry R. Keller presiding. The defendant was charged with Driving on a Revoked License. The matter was tried before a jury and the jury returned a verdict of guilty. The defendant appealed alleging that the Circuit Court committed error when it denied defendant's Motion to Suppress Evidence acquired at the stopping of the defendant by Officer Marcellin, in that the officer did not have just cause to stop the defendant's vehicle. Also that the Court errored in allowing in testimony that the reason for the revocation was Driving Under the Influence of Alcohol. The defendant also contends that the trial court exceeded its discretion in the sentencing in that it considered information not contained in the presentence report and was received outside of the presence of the defendant and not in open court.

The Court finds, based on the facts in this case, that Officer Marcellin did have just cause to stop the defendant's vehicle to check to see if he had a valid driver's license and the Court properly denied defendant's Motion to Suppress the Evidence obtained at the stopping. The testimony as to the cause of the revocation, to wit: driving under the influence was not necessary to the State's case, however, it was not prejudicial error that would cause a reversal.

The Court further finds that the sentencing is a judicial procedure and the defendant entitled to confront the witnesses and know what the pre-sentence report says. The Circuit Court Judge did consider information that was improperly received. The Supreme Court of California in the case of *People vs Giles* 161 P 2d states:

> "In undertaking to ascertain facts from which it could determine what sentence should be imposed on that defendant, the trial court was engaged in a judicial proceeding. Such facts as were not supplied by the probation officer's report and by the record of the trial, which had been held, should have been obtained from the lips of the witnesses called in open court, in the presence of the defendant, instead of limiting his search for the facts to these proper sources, the trial judge listened and gave great weight to reports received outside of court, with a result that the judgment entered was prejudicially influenced by these improperly received accusations."

See also *State vs lipsky* 608 P 2d 1241 1953, as amended Section 77-33 5-22(a).

Based on the foregoing, the Court does affirm the verdict of the Jury, reverses the sentencing and remands the matter back to the Circuit Court for further proceedings.

DATED this 19 day of Oct., 1982.

HOMER F. WILKINSON
DISTRICT JUDGE

RICHARD G. MacDOUGALL
Attorney for Defendant
321 South 600 East
Salt Lake City, Utah 84102-4082
Telephone: (801) 531-1990

CIRCUIT COURT, STATE OF UTAH

SUMMIT COUNTY, COALVILLE DEPARTMENT

STATE OF UTAH	MOTION AND ORDER STAYING EXECUTION OF SENTENCE PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI
Plaintiff,	
JAMES MONTGOMERY	
Defendant.	Case No. 81-CR-311

Defendant moves the Court as follows:

1. In the above entitled case, Defendant was sentenced on November 3, 1982, by the Honorable Melvin H. Morris to thirty days in jail, to be suspended upon payment of a fine in the sum of $299.00

2. On November 9, 1983, pursuant to a motion by Defendant, the Court stayed execution of sentence pending a disposition of Defendant's appeal to the Supreme Court of Utah.

3. Defendant's conviction was confirmed by the Supreme Court of Utah on June 10, 1983.

4. Defendant is preparing a petition for certiorari to be filed with the Supreme Court of the United States on or before August 10, 1983.

5. Defendant requests the Court to extend the stay of execution of sentence pending disposition of Defendant's petition for writ of certiorari.

DATED this 30 day of June, 1983.

RICHARD G. MacDOUGALL
Attorney for Defendant

ORDER

Based on Defendant's Motion and good cause appearing, IT IS HEREBY ORDERED that execution of sentence in the above entitled case is stayed pending disposition of Defendant's petition for writ of certiorari which shall be filed by Defendant with the Supreme Court of the United States on or before August 10, 1983.

DATED this 1st day of July, 1983.

BY THE COURT:

HON. MELVIN H. MORRIS
Circuit Court Judge